ATTORNEY FOR APPELLANT:

MICHAEL L. CARMIN
Andrews Harrell Mann Carmin & Parker, P.C.
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

GEOFFREY M. GRODNER
KENDRA GOWDY GJERDINGEN
Mallor Clendening Grodner & Bohrer, LLP
Bloomington, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAN HAYDEN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 53A01-0710-CV-465
	)	
THOMAS LILLEY,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Stephen R. Galvin, Judge
Cause No. 53C06-0702-PL-364

April 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jan Hayden appeals the trial court's decision in a contract dispute involving the failed sale of her property to Thomas Lilley. We reverse and remand.

Issues

Hayden raises several issues, which we consolidate and restate as:

I. whether the trial court properly ordered her to return $110,000 to Lilley; and

II. whether the trial court erred in failing to award her attorney fees.

Facts

Hayden is a certified public accountant with an office in Bloomington. Thomas Lilley offered to purchase her office building for $600,000 and she accepted his offer on January 26, 2006. The offer and acceptance (hereinafter "the agreement") were submitted through real estate broker Tim Ellis. The terms included a $10,000 payment of earnest money by Lilley to Hayden, which was held by Ellis. The agreement stipulated a closing date on or before April 26, 2006, and the agreement would terminate if the parties did not close. Pursuant to the agreement, Hayden would have until August 31, 2006, to deliver possession of the property to Lilley.

Financing difficulties prevented the closing from going forward by April 26, 2006. On March 22, 2006, Ellis sent an email proposing a solution to the parties. It stated:

> Tom:
>
> Your current purchase contract with Jan for the purchase of her building located at 117 E. Sixth St., Bloomington, IN, calls for the financing contingency to be removed by 3/26/06

> and for the deal to close by 4/26/06 provided the City has OK'd your plan. I'm holding your $10,000 earnest money deposit in my escrow account and you have agreed to pay $3000 of those funds to Jan if the deal does not close for any reason.
>
> Here are the terms you suggested to extend the closing date: You hereby waive the financing provision effective this date. Then, if the city approves the plan to your satisfaction by 4/26/06 then you will pay to Jan $100,000 plus have me release to her the $10,000 I'm holding in escrow for a total of $110,000. Then, you will assume her carry costs at the building including $2,810 monthly mortgage payment, $150 monthly insurance, and $241 monthly property taxes, for a total monthly amount of $3,201. This reimbursement to her will continue from 4/26/06 until closing which must be no later than 10/31/06. She will pay her own utilities during that time. If you do not close for any reason by 10/31/06 then she can retain all monies paid to her and for her by you to that time and will be free to sell her building to another buyer. If you close the $110,000 and principal paid on her loan will apply to the purchase price.
>
> In addition, you may have a Phase I environmental inspection done prior to 4/26/06 if you so choose and if you are not satisfied with the results of that report, you are not obligated to close. The Phase I will be at your expense.
>
> If this revision to the original contract is satisfactory to you please advise me via e-email and I'll forward to Jan for her review.

Appellant's App. p. 48. Lilley and Hayden accepted the amendment via email responses the next day and Lilley paid $110,000, which included the release of the initial $10,000 in escrow, to Hayden. Lilley also began paying Hayden's monthly expenses in accordance with the amendment. Lilley did not obtain a Phase I environmental inspection by April 26, 2006.

In September, problems arose regarding the post-closing possession and environmental cleanup costs.[1] Hayden insisted on a period of post closing possession in order to have time to relocate her office. She also expressed doubts about Lilley's ability to finance the project. She relayed these concerns in emails to Ellis on September 6 and 9 and October 6, 2006.

On October 27, 2006, Lilley's attorney sent a letter to Hayden's attorney regarding the environmental cleanup costs. This letter stated that Lilley would close provided Hayden agreed to escrow $200,000 of her closing proceeds. On October 31, 2006, Lilley's attorney emailed Hayden's attorney and explained that Lilley has been prevented from closing due to the condition of the property. He stated he would be ready to close if he was allowed to reserve the rights to remediation costs and that possession must be delivered at the time of closing. Later that day, Lilley's attorney sent another email to Hayden's attorney again insisting that possession be delivered at closing, but noting that "we may be able to work something out on a very short-term basis." Ex. E. Lilley had also requested access to Hayden's insurance policies on the properties to investigate whether her insurance could cover any environmental remediation, but Hayden did not allow him such access.

[1] Apparently an environmental inspection was conducted at some point, but neither the findings nor the record shed light on this topic. Lilley testified at the bench trial that he did not do the inspection by the April 26, 2006, deadline, and Hayden allowed him access to the property twice to do a late inspection.

The closing was rescheduled to November 2, 2006.[2] Lilley, Hayden, and their respective attorneys attended the November 2, 2006 closing. Peter Dvorak, a real estate developer, also attended because he had entered into an agreement with Lilley to provide the funds necessary for closing. Closing documents had been prepared by Lilley's attorney and approved by Hayden's attorney. The closing began with negotiations to resolve the environmental cleanup dispute and the post-closing possession dispute. Hayden left the meeting after forty-five minutes without closing. She retained the $110,000 paid to her.

Lilley filed a complaint and motion for a preliminary injunction against Hayden on February 20, 2007. He alleged Hayden breached the contract and requested specific performance, damages, and attorney fees. Hayden filed an answer and counterclaim. She alleged that because Lilley failed to close by October 31, 2006, she was entitled to keep the $110,000 previously paid by him and she was entitled to attorney fees. The trial court held a hearing on March 19, 2007, on Lilley's motion for injunction and denied the motion. The trial court held a bench trial on May 29, 2007, on the other issues. Lilley's counsel requested findings of fact and conclusions of law.

The trial court held that both parties failed to comply with the agreement and the subsequent amendment and that neither party was willing to close. The trial court concluded that Lilley was entitled to the return of his $110,000 plus interest at 8% and that neither party was entitled to attorney fees. This appeal followed.

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[2] The record is unclear on how, if at all, the parties reached an agreement to reschedule this closing meeting.

Analysis

In a case where, as here, the parties request findings of fact and conclusions of law, we use the following standard of review:

> First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Challengers must establish that the trial court's findings are clearly erroneous. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. However, while we defer substantially to findings of fact, we do not do so to conclusions of law. Additionally, a judgment is clearly erroneous under Indiana Trial Rule 52 if it relies on an incorrect legal standard. We evaluate questions of law de novo and owe no deference to a trial court's determination of such questions.

Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001).

I. $110,000 Payment

Hayden contends the trial court erred in ordering her to return the $110,000 to Lilley and in doing so, that it failed to enforce the parties' agreement as written. The parties dispute the classification of this payment. Hayden contends that the $110,000 constituted consideration for her willingness to extend the closing deadline and was not earnest money. Lilley contends the total $110,000 is earnest money, and the trial court assigned this label to the payment. "Earnest money" is defined as "a deposit paid (usually in escrow) by a prospective buyer (especially of real estate) to show a good-faith

intention to complete the transaction and ordinarily forfeited if the buyer defaults." Black's Law Dictionary, 525-26 (7th ed. 1999).

Clearly, the initial payment of $10,000 was earnest money and the agreement classifies it as such. Once the parties executed the amendment, the $10,000 was released and distributed to Hayden with the additional $100,000. After classifying the $110,000 as earnest money, the trial court then relied on Missouri and Illinois cases to conclude that a seller may not retain such money when both parties are in default. We find that such a conclusion is erroneous. Hayden contends the $110,000 is a non-refundable payment that served as consideration for holding the offer open longer, and we agree. This money was not held by Ellis, but was instead paid directly to Hayden.

The relevant language in the amendment is, "if you [Lilley] do not close for any reason by 10/31/06 then she can retain all monies paid to her and for her by you to that time and will be free to sell her building to another buyer." Appellant's App. p. 48. This amendment clearly states that Hayden is to keep all payments if Lilley does not close for "any reason." Id. It does not make exceptions for Lilley not closing in the event of continued negotiations on environmental cleanup or post-closing possession.

"Indiana courts recognize the freedom of parties to enter into contracts and presume that contracts represent the freely bargained agreement of the parties." Cincinnati Ins. Co. v. American Alternative Ins. Corp., 866 N.E.2d 326, 333 (Ind. Ct. App. 2007), trans. denied. Contracts "represent private, voluntary allocations by which two or more parties distribute specific entitlements and obligations." New Welton Homes v. Eckman, 830 N.E.2d 32, 35 (Ind. 2005). Here, the parties agreed that in

exchange for postponing the closing date and not selling her building to someone else, Hayden was entitled to a payment of $110,000. Lilley was obligated to close by October 31, 2006, and was entitled to postpone this bargain beyond the originally agreed upon date of April 26, 2006.

The trial court did explicitly conclude that both Lilley and Hayden breached the agreement, stating:

> 2. The Plaintiff's refusal to close on the Property without additional concessions from the Defendant on the issues of the environmental remediation constitutes a material breach of the agreement to purchase the Property.
>
> 3. The Defendant also breached her obligations under the Offer and Amendment by refusing to close on the Property if she did not retain possession for a substantial period post-closing. The Offer provided for a date of possession of August 31, 2006. The Amendment did not specify a new date of possession. No other written agreement exists. The Defendant doubted that the Plaintiff could obtain funding for the purchase. She did not make arrangements to move her business prior to closing.

Appellant's App. p. 11. Because it concluded that Lilley breached the agreement, however, the trial court erred by also concluding that Lilley was entitled to the return of the $110,000. These two conclusions are contradictory and are not supported by the findings. The findings of fact include the full text of the amendment, yet the conclusions ignore the amendment's plain language. Perhaps the trial court was attempting to "split the baby," by saving Lilley his $110,000 while not granting specific performance or making Hayden pay back the monthly expenses covered by Lilley between April and October. Such a result, however, did not comport with the contract for the sale of the

property. Lilley offered the $110,000 to Hayden in exchange for his promise to close on or before October 31, 2006. When he did not hold up his end of this bargained for exchange, he lost. Lilley places the blame for the failed closing on Hayden, but the record reveals that Lilley could not get Hayden to agree to new terms during the November 2 meeting. Hayden was ready to close on the deal she bargained for—as recorded by the agreement and amendment. She was not obligated to agree to new terms during the closing. Although a dispute regarding the possession date existed, the record indicates this dispute was not the only impediment to this closing.

Despite what may have occurred at the meeting on November 2, 2006, it is clear from the record that Lilley did not close by October 31, 2006—three days before this meeting. The amendment provided that if Lilley did not close "for any reason by 10/31/06 then [Hayden] can retain all monies paid to her." Appellant's App. p. 48. Lilley simply did not close by the agreed upon date. The record is void of any written agreement to extend the deadline. Lilley testified that he thought his counsel communicated with Hayden's counsel, but admitted there is no written agreement to move the closing date to November 2, 2006. Hayden is entitled to keep the $110,000 in accordance with the parties' agreement and subsequent amendment.

II. Attorney Fees

Hayden contends that the trial court erred by failing to award her attorney fees and such an award is part of the agreement, which provides for attorney fees for the prevailing party in litigation brought with relation to the offer. The relevant section of the agreement states:

> 24. ATTORNEY'S FEES: Any party to this Offer who is the prevailing party in any legal or equitable proceeding against any other party brought under or with relation to the Offer or transaction shall be additionally entitled to recover court costs and reasonable attorney's fees and costs from the non-prevailing party.

Appellant's App. p. 46. Lilley contends that because the trial court found that Hayden breached the agreement, she did not prevail in the proceedings and therefore is not entitled to attorney fees. Because we concluded that the trial court erred, Hayden has now prevailed for purposes of the attorney fee provision of the contract. We remand for the trial court to award Hayden the attorney fees accrued in defending the action.

Conclusion

The trial court's conclusions regarding Lilley's breach and the return of the $110,000 are contradictory and not supported by the findings. We also conclude that Hayden is entitled to the attorney fees accrued defending Lilley's action. We reverse and remand.

Reversed and remanded.

CRONE, J., and BRADFORD, J., concur.